No. 20544

In the

United States Court of Appeals

For the Ninth Circuit

STOCKTON PORT DISTRICT,
Petitioner,

vs.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

Brief of Intervenors Pacific Westbound Conference and Its Member Lines

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SUBJECT INDEX

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I.

INTRODUCTORY

A. Counterstatement of the Case

Petitioner's "Statement of the Case" (Stock. Br. 2-7)[1] is an irrelevant reiteration of the contentions resolved against Stockton by the Presiding Examiner and the Federal Maritime Commission

1. Throughout this brief, the following abbreviations will be employed: "Stock. Br." for Petitioner's Opening Brief, "Com. Rep." for the Commission's Report and Order, "Concur. Op." for Commissioner Patterson's Concurring Opinion, "I.D." for the Presiding Examiner's Initial Decision, "Tr." for the Reporter's Transcript of Testimony and "R." for the Record of this Court.

rather than a description of issues properly before this court upon review of the final action of an administrative agency. The obvious intent of Stockton throughout its brief is to invite this court to substitute its judgment for that of the Commission with respect to fact, law and policy matters, which Congress has entrusted to the agency expert in the maritime regulatory field for final determination in the exercise of its functions under the Shipping Act, 1916. On judicial review of the agency action, the issue is not whether other findings and conclusions were permissible, but rather whether it is warranted by the record and has a reasonable basis in law; a test plainly met here.

In any event petitioner's Statement of the Case is incomplete and misleading calling for an introductory counterstatement of the principal issues of the case.

For approximately twenty-five years the Pacific Westbound Conference (PWC) and its member lines serving the outbound trade from the Pacific Coast to the Orient have practiced port equalization in the San Francisco Bay Area with the approval of and in accordance with standards laid down by the Commission and its predecessor agencies (Tr. 758, 771-75). Simply stated, that practice affords to shippers located closest to terminal ports, which do not have service adequate to meet their needs, access to vessels loading at other terminal ports at no additional cost to the shipper and at the least cost to the carrier. This is accomplished by having the carrier absorb the difference in inland transportation costs between shipping to the terminal port located nearest to the shipper and the costs of shipping via the terminal port more distant from the shipper but, as to the shipment equalized, more convenient to the carrier's operation.

There is no serious dispute over the fact that equalization is beneficial to the shipper and that the shippers who use it are enthusiastic supporters of equalization as is fully documented at pages 23-25, *infra*. Access to frequent and dependable service enables the shipper to be competitive with his domestic and

foreign competitors and increases and is beneficial to the foreign commerce of the United States.

As we will show subsequently (*infra,* pages 21-23), equalization is also undeniably beneficial to the carrier in enabling it to make the most efficient and economic use of its vessels. Without equalization, carriers would be forced to one of three costly alternatives on nearly every sailing: either, (1) proceed to each terminal port to pick up minimal parcels of cargo, an uneconomic trip, or, (2) transship from one port to another by truck or barge at carriers' entire expense plus the charges of two terminal operators, i.e., the nearest port and the port where the cargo is loaded, or, (3) forego the cargo. When carriers' costs are increased the addition can only come from corresponding increases in ocean rates. Elimination of equalization would seem to make freight increases inevitable.

Stockton competes with its sister ports in the San Francisco Bay Harbor Complex for the industrial and agricultural exports originating in Northern California. No other port has attacked equalization and one port, San Francisco, intervened in the proceedings on behalf of the ocean carriers and demonstrated that its interest in equalization was at least equal to that of Stockton (Tr. 1134-35, 1143-45). The abandonment of equalization could only come at the expense of San Francisco and other Bay Area ports competitive with Stockton. Equalization has no effect upon Stockton's principal activity—the handling of bulk cargoes. (Exs. 44-46; Tr. 144). If the Commission decision, upholding equalization between the San Francisco Bay Harbor Complex ports, is reversed, the segment of the foreign commerce of the United States served by those ports would be impeded.

The policy question determined by the Commission was whether the narrow self-interest of an individual port, Stockton, must prevail over the combined interests of shippers, carriers and Stockton's sister ports in the Bay Area which serve tributary areas overlapping or identical with Stockton's tributary area. The Fed-

eral Maritime Commission held that the foreign commerce of Northern California should not be fragmented arbitrarily into blocks of cargo which become the monopoly of individual ports, each of which serve the same geographical area, to the point where shipper needs are ignored, efficient and economical steamship service is compromised and the foreign commerce of the United States inhibited. The question now before this Court is whether that policy and the findings and determinations leading up to that policy determination are reasonably supported by the record and are warranted by law.

B. Spurious Issues Raised by Stockton

In its Statement of the Case, Stockton raises several spurious issues. For example, at page 2 of its brief Stockton contends that the decision of the Commission will have "a far-reaching, disastrous effect" on various ports throughout the United States. If this were a valid observation many ports might have been expected to intervene. It is just not so and this is a blatant attempt to inflate the localized findings and conclusions of the Commission into a matter of national significance.

The issues in this case and the Commission report and decision deal only with certain California ports. This appeal concerns only that portion of the decision relating to those ports serving Northern California's hinterland located on the waterways served through the Golden Gate—the San Francisco Bay Harbor Complex Ports. There was not one shred of evidence concerning ports or ocean carrier service outside California or any possible effect of equalization upon the same.

The contention that, through equalization the Conference Lines "and indeed foreign steamship lines" have the power to determine which ports shall prosper and which shall be deprived of cargo, is another unwarranted charge. As more fully demonstrated below (*infra.* pages 17-28), the Commission's conclusions that equal-

ization is justified rest upon geographical, economic and public interest considerations above and apart from any claimed but non-existent desire of the respondent carriers, irrespective of nationality, to encourage or stifle port development.

The suggestion consistently intimated, but never documented, that, through equalization, Stockton has suffered any decline of its fortunes as a port is wholly unsupported in view of the uncontradicted evidence showing Stockton has continued its astonishing growth as the self-advertised "West Coast's fastest growing port" during the years it has supposedly been disadvantaged by equalization (Tr. 144). Unlike the other ports within the San Francisco Bay Harbor Complex with which it competes, Stockton has enjoyed enormous gains in the amount of cargo of every description handled by it since its designation by the Conference as a terminal Port in 1957 (Exs. 44-46).

The attention of this Court should also be directed to the persistent reference by Stockton to equalization as a "rebate." That term, as we shall see, when used in connection with Section 16(Second) of the Shipping Act, 1916, (46 U. S. Code 815) (the alleged basis for Stockton's use of the term) connotes payments made surreptiously and unfairly to a shipper, so as to give him a rate lower than that provided for in the published tariff. During the course of the proceedings Stockton charged that equalization is a "cloak for malpractices" and that equalization payments were improperly calculated under the tariff rules. All such contentions were resoundingly rejected, both by the Examiner and the Commission, (Com. Rep. 17-23, I.D. 21-26; R. 1282-88, 1252-57) and no objection to that part of the decision is taken to this Court. The persistent recourse by Stockton to the term "rebates" serves no legal purpose and its use is obviously intended solely for its inflammatory effect.

II.

SUMMARY OF ARGUMENT[2]

A. That Courts will not substitute their judgment for that of an administrative agency and that the findings of such agencies are entitled to great weight, are well recognized principles of law. Their application to decisions of the Federal Maritime Commission, which possesses expertise in the field of shipping regulation, has been most recently recognized in *Consolo v. Federal Maritime Commission, infra,* at page 12, and by this Court in *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission, infra* at page 11. In the instant case the Commission and the Examiner before it, after an extensive hearing, prepared thoughtful, logical decisions fully supported by findings and conclusions. The Petitioner, Stockton Port District, therefore has the heavy burden of making a clear and convincing showing of alleged errors. Stockton has failed to discharge that burden, but instead improperly seeks to have this Court substitute its judgment for that of the Commission.

B. The Commission and the Examiner both concluded that the Port of Stockton should properly be considered an integral port of and within the San Francisco Bay Harbor Complex and that areas naturally tributary to Stockton are equally so to, and can be naturally served at, San Francisco and the other ports within the same geographical area. These conclusions were made after the Commission and Examiner had considered all factors bearing upon the economics of transportation and the natural flow of traffic through San Francisco Bay and connecting waterways to the Far East. These included the close geographical relationship between the ports served through the Golden Gate and the historical pattern of the successive development of the San Francisco Bay Harbor Complex ports, each competing for cargoes originating in the same or overlapping tributary territory. Also

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2. Provisions of statutes and regulations relied upon by these intervenors in support of their position appear in Appendix A of this Brief.

weighed were the economics of ocean carriers for whom consolidation of loading operations is necessary to promote efficient service and the shipping public who need equalization to give them access to the shipping services they would not otherwise have and which is vitally needed to enable them to compete effectively in world markets. The Commission and the Examiner also duly considered prior determinations made by the Departments of Commerce and Defense, and the State of California, which in full accord with the Commission's conclusions, recognizes the unity of the San Francisco Bay Harbor Complex Ports. The findings and conclusions of the Commission in this regard are fully supported by substantial evidence.

C. Section 8 of the Merchant Marine Act, 1920, (46 U.S.C. § 867) is evidence of a Congressional policy favoring port development. No functions under that statute have been transferred to the Federal Maritime Commission. The Commission, nonetheless, gave full consideration to the policy evidenced by Section 8 in concluding that the ports on San Francisco Bay and connecting waterways all serve the same tributary area. In an attack on the Commission, in which reason is dethroned, Stockton inaccurately accuses the Commission of "ignoring" the policy of Section 8 while at the same time castigating the Commission for implementing that policy by acting in accordance with definitive reports of the Departments of Commerce and Defense prepared pursuant to Section 8, respecting the San Francisco Bay Harbor Complex Ports.

D. The Commission carefully weighed equalization in the light of the public interest, which includes each participant in the overseas commerce of Northern California—the shipping public who need and require equalization, and the ocean carriers, to whom equalization is an economic necessity. The Commission also considered other participants, the interests of the ports, finding that Stockton's claims of lost cargo and lost revenues were overstated and speculative and that cessation of equalization

could only come at the expense of Stockton's sister ports in the same geographical area. The Commission concluded, on the basis of these facts, that equalization was beneficial to the foreign commerce of the United States and in the public interest. Stockton insists that the public interest, as a matter of law, is identical with the self-interest of Stockton and that the other interests can not properly be considered, a proposition unsupported by the facts, logic, by Section 8 of the Merchant Marine Act, 1920, or otherwise by law.

E. The Commission found that, since all the ports on San Francisco Bay and its connecting waterways are in the same geographical area, and each naturally serves the same tributary area, the prejudice or disadvantage, if any, to the Port of Stockton arising from equalization was neither unjust, undue or unreasonable within the meaning of Sections 15 and 16 (First) of the Shipping Act, 1916 (46 U.S.C. §§ 814, 815). This conclusion is also supported by the Commission's findings that equalization is in the public interest by promoting the interests of shippers and carriers. Stockton is unable to demonstrate it has exclusive claim to cargoes originating in the San Joaquin Valley, or that it has a legal right to such cargo superior to the interests of its sister ports, the shippers and carriers. Stockton's claim that Sections 15 and 16 (First) require adoption of its unsound, constructive mileage theory of port cargo control has no basis in law. The findings and conclusions of the Commission respecting the lack of undue, unjust or unreasonable discrimination or prejudice, being supported by substantial evidence, are clearly warranted by law.

F. Stockton's claim that the Commission's Report and Order is inconsistent with prior decisions is not a valid basis for setting aside the later decision of an administrative agency. The question is whether the Commission's decision has support in the record and is in accordance with law. Nonetheless, the Commission report and order represents a painstaking and successful effort to

reconcile its decision in this case with its prior decisions and those of its predecessor agencies. Stockton's efforts to distinguish these cases are wholly unavailing.

G. Section 205 of the Merchant Marine Act, 1936, (46 U.S.C. § 1115) is administered, not by the Commission, but by the Department of Commerce acting by and through the Maritime Administration. The policy lying behind the statute is to assure that service will not be prevented at ports constructed with federal funds by rate discrimination, whereby carriers assess different ocean rates at such a port than at an adjacent port. The carriers here are in literal compliance with that policy since the same ocean rates, and (if pertinent to Section 205) the same equalization rules apply at every San Francisco Bay Harbor Complex terminal port. In any event equalization does not prevent service at Stockton, but enables carriers to compete for Northern California cargoes on an economically feasible basis, a result not contrary to any policy derived from Section 205.

H. Section 16 (Second) of the Shipping Act, 1916, (46 U.S.C. § 815) makes it a criminal offense for a carrier, by means of concealment and falsification or other unjust or unfair means, to charge any shipper less than as provided in its established and published rates. Stockton, in a newly discovered claim, charges the carriers with violation of Section 16 (Second) despite the Commission's clear rejection of comparable charges against equalization made by Stockton under other provisions of law. Stockton's claim in this regard rests upon a distorted reading of the equalization rules provided in the Conference tariff and is entirely without merit.

I. Stockton's casual claim of a violation of the Fifth Amendment of the United States Constitution is wholly without substance, particularly since the Commission's Report and Order is warranted by law and supported by substantial evidence.

III

ARGUMENT

A. Scope of Judicial Review

The standards applicable to this judicial review are found in Section 10(e) of the Administrative Procedure Act (APA), (5 U.S.C. § 1009(e)). It has been explained that:

> "The provisions of Section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions. . . .
>
> "This [Section 10] restates the present law as to scope of judicial review." (Attorney General's Manual on the Administrative Procedure Act, 1947, pp. 98 and 108.)

Section 10 provides that the court of review shall set aside agency action, findings and conclusions in six different situations. Stockton has, in its Petition for Review (Par. IX) invoked 3 of the 6 grounds for review (under subparagraphs (1), (2) and (5) of Section 10(e)(B)). Petitioner asks this Court to review the Report and Order to determine whether it has shown the Commission's decision to be "arbitrary, capricious, an abuse of the Commission's power of discretion, and not in accordance with law, . . . unsupported by substantial evidence . . . and is to such extent based on errors of law" and whether it "deprives petitioner of property without due process of law in violation of the Fifth Amendment . . ."[3]

Resolving considerations under the Shipping Act, 1916, as amended, is a complex task which requires expert judgment and considerable knowledge of the shipping industry. Congress gave that task to the Federal Maritime Commission (Reorganization Plan No. 7 of 1961, 46 U.S.C. § 1111 (note)). This court

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3. Stockton makes no claim that the Commission acted in excess of its statutory jurisdiction, authority or limitations or short of statutory right, or without the observance of procedure required by law (Sec.10(e)(B)(3) and (4)). This is not a case where the courts review facts *de novo* referred to in Sec. 10(e)(B)(6).

has recognized the discretion confided to the Commission in administering those regulatory acts entrusted to it.

> "It has long been recognized that (the Commission) . . . . has a broad discretion in effectuating the policies of the (Shipping) Act. . . . The question always is whether the determination . . . . has 'warrant in the record' and a 'reasonable basis in law'. . . .
>
> "* * * * Unless it be recognized that the Commission had this discretion and power of determination it could not be said to have adequate power to effectuate the policies of the Shipping Act." *Trans-Pacific Freight Conference of Japan v. Federal Maritime Commission,* 314 F.2d 928, 935 (9th Cir. 1963).

The burden is on Stockton to demonstrate to the Court why any findings or conclusions of the Commission should be rejected and that other findings and conclusions must be made. "[H]e who would upset the . . . order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences" (*Interstate Commerce Commission v. Jersey City,* 322 U.S. 503, 512-13 (1944)).

The role of the agency is described by the Supreme Court as follows:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. *It cannot substitute its own view* concerning what should be done, whether with reference to competitive considerations

> or others, *for the Commission's judgment* upon matters committed to its determination, if that has support in the record and the applicable law." (*United States v. Pierce Auto Freight Lines,* 327 U.S. 515, 535-36 (1946).)[4]

Section 10(e) has been interpreted by the Supreme Court to require a reviewing court to affirm the findings of an administrative agency if, taking the record as a whole, they are supported by substantial evidence. In a recent decision the Supreme Court defined its role in this regard as follows:

> "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' . . . *This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . . .*
>
> "Congress was very deliberate in adopting this standard of review. It frees the reviewing courts of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." (*Consolo v. Federal Maritime Commission,* ..... U.S. ....., 16 L.ed 2d 131, 140-1 (1966) (Citations and footnotes omitted)).

In matters of statutory construction, the Court will give great deference to the interpretation given the statute by the officers or agency charged with its administration. *Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Pennsylvania R. Co. v. Day,* 360 U.S. 548, 552 (1959). In *Udall v. Tallman* the Court restated the role of the Courts and Agencies in construing the statutes as follows:

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4. Emphasis throughout this Brief supplied unless otherwise noted.

" 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " 380 U.S. at 16. (Citations omitted).

Throughout its brief petitioner relies almost exclusively upon extensive quotes from the dissent of Commissioner Hearn, who alone of the five Commissioners disagreed with the findings and conclusions of the Examiner. The court, however, is in no way bound by this dissent, and its existence cannot be considered grounds for reversal of the Commission's order. The Commission "acts as a unit, and a dissent no more reduces the legal effect of its findings and orders than does a dissenting opinion of a member of a court detract from the legal effect of the court's judgment." *Sperry Gyroscope Co. v. N.L.R.B.,* 129 F.2d 922, 924 (2d Cir. 1942).

> "The fact that differences of opinion regarding the facts and the law existed within the Commission and its staff does not, of course, mean that the final order of the Commission is entitled to any less respect than it would possess had the issues been decided unanimously." *United States v. I.C.C.,* 198 F.2d 958, 963 fn. (D.C. Cir. 1952).

The validity of the Commission's action does not depend upon unanimity among agency members, but upon compliance with the criteria set forth in Section 10(e) of the APA. *United States v. I.C.C., supra; Wyman Gordon Co. v. N.L.R.B.,* 153 F.2d 480, 483 (7th Cir. 1946); *N.L.R.B. v. Murray Ohio Co.,* 326 F.2d 509 (6th Cir. 1964).

On the other hand, additional weight should be given to the fact that the Commission's Report and Order, and Commissioner Patterson's concurring opinion specifically incorporate the Initial Decision of the experienced Presiding Examiner who heard and weighed the evidence presented before him in the first instance, as follows:

> "For the reasons set forth herein we agree with the conclusions of the examiner and, if in stating those reasons we fail to treat any 'specific exception', it has nevertheless been considered and found not justified." (Com. Rep. 10, R. 1275; See also Concur. Op. 8, 9, 11, 12, 19, 20; R. 1313-14, 1316-17, 1324-25).

The Commission considered and rejected a barrage of exceptions to the Examiner's Initial Decision, many of which have been renewed here. Petitioner's claims have thus been found wanting at both levels of the administrative process.

While Stockton claims "arbitrariness, capriciousness, and abuse of discretion" it does not argue these points. Such claims have been held to be wholly without merit when an agency makes sufficient findings to be dispositive of the statutory issues. *Baltimore Transfer Co. v. I.C.C.*, 114 F.Supp. 558, 564, *aff'd* 346 U.S. 890 (1953).

The foregoing legal principles must be kept constantly in mind in considering petitioner's brief for it makes no effort to direct its arguments within the legal principles governing the scope of judicial review. Essentially its arguments are an appeal to this Court to disagree with the agency as to findings and conclusions lawfully drawn by the Examiner and Commission in the exercise of their respective expertise and authorized discretion. Petitioner, contrary to the standard so recently reiterated by the Supreme Court in *Consolo, supra,* appeals to this Court to make *other* and inconsistent findings and conclusions from those made by the Commission.

B. The San Francisco Bay Harbor Complex Ports

1. THE COMMISSION'S FINDINGS AND CONCLUSIONS.

There are 16 terminal ports served by the PWC stretching along the Pacific Coast of the United States and Canada from Vancouver, B.C., southward to San Diego. Terminal ports are those designated by the Conference as to which the same ocean rates shall apply (Ex. 1c). There are an extraordinary number of ports

located on San Francisco Bay and its connecting waterways—the San Francisco Bay Harbor Complex. Inside the Golden Gate are 16 ports including six PWC terminal ports (San Francisco, Oakland, Alameda, Richmond, Stockton and Sacramento), the largest concentration of terminal ports on the Coast (Exs. 1c, 4, 60).

The Commission held: "We agree with the examiner's conclusion that the ports of Stockton and San Francisco do not represent separate and distinct geographical areas." (Com. Rep. 12, R. 1277). The Examiner's conclusion referred to described the unifying geographical features of these ports as follows (I.D. 14, R. 1245):

> "As between Stockton and San Francisco, with which this proceeding is chiefly concerned, we are not dealing with ports of a given geographical area versus those of another geographical area, but with a single port as against another port in the same geographical area—in fact, in the same harbor complex. In a geographical sense, both ports, together with the other ports on the San Francisco bays and their connecting waters, may be described as San Francisco bay ports. . . . The natural direction of the flow of ocean traffic from the entire relevant geographical area is to the Pacific Ocean via the Golden Gate; that strait is the ocean portal through which ocean traffic to and from the harbor or haven must flow. Stockton simply does not exist as an ocean port separate from the Golden Gate and the San Francisco bays."

Commissioner Patterson, in his Concurring Opinion (p. 19, R. 1324) stated that the foregoing statement of the Examiner,

> "... serves the useful purpose of highlighting the dominating geographical fact of this case, and of recognizing the geographical fact which prevents Stockton from having superior rights over San Francisco. The fact is that, to serve Stockton once, a carrier must go through the Golden Gate and pass San Francisco at least twice. If Stockton is served, so inevitably is San Francisco."

The Commission also found, in addition to the common bond of the geography:

> "The natural direction of the flow of traffic from the San Joaquin Valley, which Stockton seeks to have declared its exclusive preserve, is through the Golden Gate to the Pacific Ocean. For almost a hundred years before Stockton was made accessible to oceangoing vessels, San Francisco was the principal port through which freight from the San Joaquin Valley would and did pass. It did not cease to be such a port merely upon the creation of an additional port at Stockton." (Com. Rep. 13, R. 1278).

The Commission adopted the following conclusion, as did the Examiner (I.D. 19, R. 1250), in the following language:

> "We conclude, that for the purposes of this proceeding, the territory naturally tributary to Stockton should properly be considered naturally tributary to San Francisco and other San Francisco Bay area ports. To paraphrase the *Beaumont* decision, supra, the territory surrounding Stockton and the entire Bay area is centrally, economically and naturally served by the conference facilities at San Francisco." (Com. Rep. 16, R. 1281).

At page 20 of his concurring opinion (R. 1325), Commissioner Patterson interpreted and commented on this conclusion as follows:

> "I understand the Examiner to be saying in effect that detriments to commerce have to take this dominating fact into consideration, (i.e., the common Gateway of the Golden Gate) and the measuring point for territory 'naturally' tributary or the point where the 'natural' flow ends is not Stockton, but the Golden Gate. Unless carriers and shippers can avoid San Francisco by going to Los Angeles or somewhere else on the Pacific Coast, they should be able to make the most efficient arrangements possible to get cargo past the Golden Gate."

2. SUBSTANTIAL EVIDENCE SUPPORTING THE FOREGOING FINDINGS AND CONCLUSIONS.

Stockton argues (Stock. Br. 27-37) that the foregoing findings are unsupported by substantial evidence. The considerable evidence and factors considered by the Commission and the Examiner in this regard are outlined in the "Facts" (Com. Rep. 2-9, R. 1267-74) and "Background Facts" (I.D. 4-6, R. 1235-37) of their respective decisions, as well as in the discussion of the same. The evidence considered by the Commission may be summarized as follows:

a. Geographical Considerations

The logical first step taken by the Commission was to analyze, from the ocean transportation point of view, the salient geographical features of the San Francisco Bay Harbor Complex Ports. Of first importance, the "dominating geographical fact" of this case (Concur. Op., 19, R. 1324) and one obvious from the map (See, Ex. 60), is that the Golden Gate serves as the doorway to extensive protected navigable waterways reaching inland into Northern California's hinterland. This unique natural harbor system serving Northern California is well known to this Court. The large number of ports sharing this common gateway located on San Francisco Bay, and its connecting waterways include the 6 terminal ports with which we are here particularly concerned (San Francisco, Oakland, Alameda, Richmond, Stockton and Sacramento).

A vessel calling at Stockton or Sacramento passes twice by the "front door" of Oakland, Alameda or Richmond. Vessels calling at any of the Harbor Complex Ports necessarily call at or pass through or within hailing distance of the Port of San Francisco. This unifying feature, i.e., the common ocean gateway and the series of connecting deepwater waterways must be kept constantly in mind in view of Stockton's attempts to obscure this geographical relationship.

Stockton at page 37 of its brief ridicules the Commission for asserting that Stockton and San Francisco are in the same geographical area by ripping the term "geographical area" out of context and calling it "meaningless". However, when the Commission's predecessor used the same term in *City of Portland v. Pacific Westbound Conference,* 4 FMB 664, 679 (1955) a case which Stockton professes to admire, no such exception is taken to the use of the phrase (Stock. Br. 39).

Stockton vigorously contests the description of Stockton as a "San Francisco Bay" or "Bay Harbor Complex Port" relying principally upon captious comments, echoing those of the dissenting Commissioner, intimating that the Commission has crudely remade the map of Northern California. The Commission is charged with "transposing" Stockton to the shores of San Francisco Bay, a charge superficially bolstered by various exercises such as reciting the mileage between the Golden Gate and Stockton, the names of the various subsidiary bays and channels traversed by vessels proceeding to Stockton and distinguishing the San Joaquin Valley from San Francisco Bay (Stock. Br. 29-30). Such efforts miss the mark because they are not directed to relevant factors—the economics of transportation and the natural flow of commerce.

b. Port Development in the S. F. Bay Harbor Complex

(1) Historical Growth

The first port facilities in the San Francisco Bay Area were established at the Port of San Francisco, which enjoys, as noted above, among other natural advantages, the first suitable port location inside the Golden Gate. San Francisco was the first port established in 1863 by the California State Legislature as a harbor for the commerce of the entire State (Tr. 1114-20, 1131-32).

Subsequently, deep water ports were established at Oakland and Alameda on the eastern shore of San Francisco Bay opposite

San Francisco. Somewhat later the Port of Richmond was developed on the eastern shore near the northern extremity of San Francisco Bay. There are a dozen or more additional ports or facilities located on the Bay or on connecting waterways to the Bay. Leading from the Bay southeasterly on the San Joaquin River and served by the Stockton deepwater channel is the Port of Stockton, 75 nautical miles from the Golden Gate. Initial construction of that waterway commenced in 1933 and Stockton was recognized as a terminal port in 1957. Sacramento, the most recently established port (it became a PWC terminal port in 1963) for ocean-going vessels, is located on the Sacramento River, about 80 nautical miles from the Golden Gate. (Ex. 4, 60; Tr. 877, 1114-16).

As the San Francisco Port Authority Director testified, all the foregoing ports including San Francisco and Stockton have been competitive for 35 years (Tr. 1129-32). Each new port upon its creation has entered the competition for Northern California cargoes.

(2) The Complementary Roles of the Ports

Further demonstration of this unitary concept—the inter-relationship of the ports—was shown by the complementary roles each play in Northern California's ocean-borne commerce. As the Director of the Port of San Francisco testified:

> "We are talking about a large basin, so to speak, and I think that ports . . . within that area should be considered as one group rather than as an individual port against port. . . ." (Tr. 1132).

San Francisco has by far the greatest variety and number of berths, piers, and other facilities served by no less than one hundred sixty-eight steamship lines. It has for many years been the primary general cargo port of the area (Tr. 1114-20, 1131-32). The East Bay ports of Oakland and Alameda, also are primarily general cargo ports with heavy emphasis on canned goods. San Francisco,

Oakland and Alameda tend to be, therefore, the last ports of loading outbound, and the first ports to discharge cargo homebound, for general cargo vessels.

Richmond, another Bay Area terminal port, handles largely bulk cargoes, scrap and petroleum products along with some general cargo (Tr. 1115). Sacramento has not been operational very long as a deep water port, although it seems logical to assume that it, like Stockton, will develop as an important bulk cargo port for commodities like rice (Tr. 149-51). The other non-terminal ports of the region on San Francisco Bay proper, Suisun Bay, San Pablo Bay, serve specialized roles such as ores (Selby) or petroleum in tankers (Avon and Martinez). A number are private ports catering largely to the shipments of the proprietors of the ports. Others, like Redwood City, are non-terminal public ports (Tr. 1111-16).

Stockton also has its special niche in this ocean-borne commerce complex. The record contains a statistical record of the cargo handled by the Port of Stockton. In 1962, a little over three-quarters of all export cargoes moving through Stockton were made up of bulk or bottom cargoes (Ex. 46).[5] Thus, Stockton *is basically a bulk cargo or bottom cargo port* though it does handle exports of a general cargo nature though, as we shall show in the paragraphs which follow, not in significant amounts in the transpacific trade here involved.

(3) Traffic Originating at Stockton

The amount of service provided by PWC vessels at Stockton is governed principally by offerings of bottom cargoes—grains, fertilizers, seeds, ores and the like—moving to Far East destinations. (Tr. 768-70, 872-73, 121-23, 166). They are loaded and shipped sporadically in sizeable parcels in excess of 1,000 tons (Tr. 880-

5. During the hearing bottom cargo was identified as cargoes loaded in bulk or the same lower rated commodities (moving in sizeable lots) in bags. Commercial general cargo is essentially packaged cargo moving in relatively small lots and includes all cargo other than bottom and military cargo (Tr. 768-69, 880-81, 888-89).

81). These offerings are not spaced with the regularity to justify regular service by PWC cargo liner vessels at Stockton (Tr. 491, 881, 1059-61, 1074, 1083-84).

There are relatively small offerings of a general cargo nature moving from Stockton to the Far East—mostly condensed milk, raisins, nescafe, hides and lumber. As Commissioner Patterson observed (Concur. Op. 23, R. 1328):

> "The uneconomic nature of cargo available at Stockton is shown by the fact that the commodities affected by equalization rules average 40 tons per shipment, and in 1961 71% of all Trans-Pacific Conference ships calling at Stockton loaded as little as from 0-50 tons of general cargo per departure (Exh. 52)" (See Exs. 11, 13; Tr. 968-69).

c. Transportation Economics

(1) The Ocean Carriers

The PWC carriers serving the Orient through the Golden Gate call at San Francisco, Oakland or Alameda on 85-90% of the total Conference sailings, usually as the last port, because general cargoes are concentrated there (Tr. 765-66, 793-95). While Conference vessels do call at Stockton (84 and 133 calls in 1962 and 1963, respectively), such service is sporadic and irregular (Ex. 56; Tr. 138, 771). Some calls are made attendant with the need to discharge cargo coming inbound, many others are made to load outbound bulk or bottom cargoes. Such vessels do not attract general cargoes destined outbound to the Far East because they generally proceed elsewhere to continue discharging and loading operations for 10-12 days after leaving Stockton and this conflicts with shipper desires for prompt and rapid dispatch of their cargoes to their ultimate Far East destinations. Little general cargo is attracted (Tr. 469-70, 490, 513, 873).

In order to load general cargo at Stockton vessels must frequently shift from bulk loading and discharging berths, to another pier suitable for general cargo at a cost of $300 per shift placing

an effective minimum upon the amount of cargo sufficient to justify the shift. Depending on commodity, this varies from 250 to 700 tons (Tr. 873-76, 493).

Further, the economic cost of calling Stockton was considered by the Commission. The round trip from San Francisco to Stockton involves an extra expenditure of $3200-5000 (Tr. 531-35, 877, 1083, 1101-2). Quite obviously the carrier cannot undertake expenditures of this magnitude without the prospect of adequate cargo revenue to justify the call.

Consolidation of cargo operations at a lesser number of ports is obviously an important means of controlling the ever increasing vessel costs of the Conference member lines (Tr. 886-7, 1086). From a steamship operating standpoint unnecessary multiple port loading in any given area means an economic waste. This is particularly so in the case of vessels which arrive at the Golden Gate for "top off" loads after having taken on partial loads elsewhere. Time and space limitations compel consolidation of loading operations at one or two ports (Tr. 970-71). In short, as the Commission found, it is "not operationally feasible to call at every terminal port" (Com. Rep. 7, R. 1272).

Faced with the offer of an insufficient amount of cargo to justify a call the carrier could be required to serve each port irrespective of whether there is sufficient cargo at the port to justify the call. The inevitable result would be higher rates, satisfactory for Stockton perhaps, but unsatisfactory for the exporter and detrimental to the commerce of the United States. A determination by the ocean carrier to forego the cargo entirely, while of no apparent concern to Stockton, would be equally disadvantageous to the foreign commerce of the United States.

A third alternative is transshipment. There, the shipper delivers the cargo to a port of his selection. If the carrier has declared a receiving dock at that port, it may at its option and its expense have the cargo rehandled and rehauled overland or by barge for

loading at another port (Tr. 761-63). This is far too costly in most cases for the ocean carrier, because it must absorb the full costs of transporting the cargo from the port of delivery to the port of load, and an additional set of terminal charges (Tr. 128-30, 1095-96).[6] Transshipment is 3-7 times more expensive than equalization (Ex. 53, Tr. 763).

The fourth alternative and the most economical from the carrier point of view is equalization. In general the costs of transportation to the loading port are dependent on the mileage factor. In those cases where direct service to any terminal port in the San Francisco Bay Harbor Complex is impractical or uneconomic, equalization permits the carrier to provide the equivalent of a direct call *at the same cost to the shipper* by absorbing the added increment of inland transportation costs occasioned by the transportation of the cargo to a more distant port where the cargo is loaded. Equalization is thus more economic than a direct call for an unremunerative parcel of cargo. It is always more economic than transshipment (See Com. Rep. 14, R. 1279).

(2) The Shipping Public

Despite Stockton's incredible assertion that no such findings were made (p. 41) the Commission and Examiner did find, fully supported by the record, that service at Stockton is inadequate—not sufficiently regular, frequent or direct for the needs of shippers located adjacent to Stockton (Com. Rep. 8, R. 1273). The shippers so testified (Tr. 812, 844, 908, 982, 1004, 1031).

The PWC presented extensive testimony of shippers located in the areas closest to Stockton.[7] That testimony demonstrated

6. Under transshipment the terminal charges are paid twice: at the port to which the shipper delivers the cargo and at the loading port. Stockton of course has no objection for that reason to the transshipment mode.

7. Testimony was presented from each of the major commodity groupings moving under equalization: raisins, condensed milk, pencil slats, hides, alfalfa, beginning at Tr. 807, 840, 900, 975, 996, 1023).

that equalization gives "the shipper the best service for his particular need at lowest cost" (I.D. 15, R. 1246). The Commission Report (p. 8, R. 1273) and the Concurring Opinion (p. 10, R. 1315) accepted this testimony.

These advantages may be summarized as follows:

Each of these shippers found it absolutely necessary to have frequent and regular service to meet their shipping needs. They also find it desirable if not mandatory to be able to deliver their cargo to the vessel at or near to the last outbound loading port which, as we have shown, is rarely, if ever, Stockton. These features are vitally important for a number of reasons. For some shippers equalization is a necessity in competing with shippers from other areas to meet the consignee's required delivery dates imposed as the result of consignee's need for strict inventory control or to utilize vessels designated by the consignee (Tr. 811-12, 842-43, 905-6, 999-1001, 1031). Another reason is that delay between delivery to the port and delivery to the consignee adversely affects the out-turn condition of semi-perishable commodities like condensed milk or raisins, or may contribute to deterioration of other items like hides (811-12, 842-43, 980, 999, 1031-33). In many cases shippers require flexibility in ocean services not present at Stockton to enable them to prepare the shipment or to consolidate shipments so that they can meet delivery schedules established by the overseas buyer (Tr. 909, 979-80, 1032).

Transshipment is unsatisfactory because of the extra time it takes and the damage to the cargo caused by rehandling (Tr. 813-14, 845, 984, 1005, 1033).

The shippers unanimously supported equalization since it affords them access to the high level of service obtaining at San Francisco or other ports. Of particular importance to our foreign trade is the effect equalization has upon the ability of these shippers to compete with domestic competitors and those in other countries. Without equalization the shipper must either absorb the costs attendant upon getting his product to the point where

adequate service obtains, or he must forego the foreign sale with a consequent dampening and detrimental effect upon the foreign commerce of the United States, and upon this country's favorable trading balance of payments (Tr. 832-34, 843-45, 855-56, 906-7, 984, 990-91, 994, 998, 1006, 1016, 1021-22, 1034-35, 1138-39).[8]

d. Determinations by Other Federal Agencies

The findings of the Commission respecting tributary areas served via the Golden Gate are expressly consistent with the findings made by the Departments of Commerce and Defense pursuant to Section 8 of the Merchant Marine Act, 1920 (46 U.S.C. § 867) (Com. Rep. 12, R. 1277). That section directs those departments:

> ". . . with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, *to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce;* . . . and to investigate any other matter that may tend to promote and encourage the use by vessels or ports adequate to care for the freight which would naturally pass through such ports."

The Maritime Administration has designated those areas tributary to each San Francisco Bay Harbor Complex port in a series of studies entitled "Port Series", pertinent extracts of which ap-

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8. Actually, the record would support conclusions reflecting far wider and more enthusiastic shipper support than the Commission Report indicates. (Compare the Examiner's description, I.D. pp. 16-17, 23; R. 1247-48, 1254; Commissioner Patterson's Concur. Op. 10, R. 1315). Stockton offered no evidence contrary to the shipper testimony summarized above. Indeed, the only witness of a shipper category presented by Stockton was the "sole malcontent shipper" referred to by the Examiner (I.D. 11, R. 1242) whose main objective was not to eliminate equalization, but to obtain greater payments than he was entitled to under the rules.

peared as Exhibits 47-50 in the record. These exhibits are summarized on the map shown on the following page (Figure 1). Each terminal port shown—Sacramento, Stockton, San Francisco, Oakland and Alameda—draws its cargoes from a mutually overlapping tributary area comprising the Northern California hinterland. With specific reference to the contentions of Stockton, the Maritime Administration has determined, taking into account "the economies of transportation and the natural flow and direction of commece" that the San Joaquin Valley which Stockton claims exclusively for itself is tributary to each of the aforementioned ports.

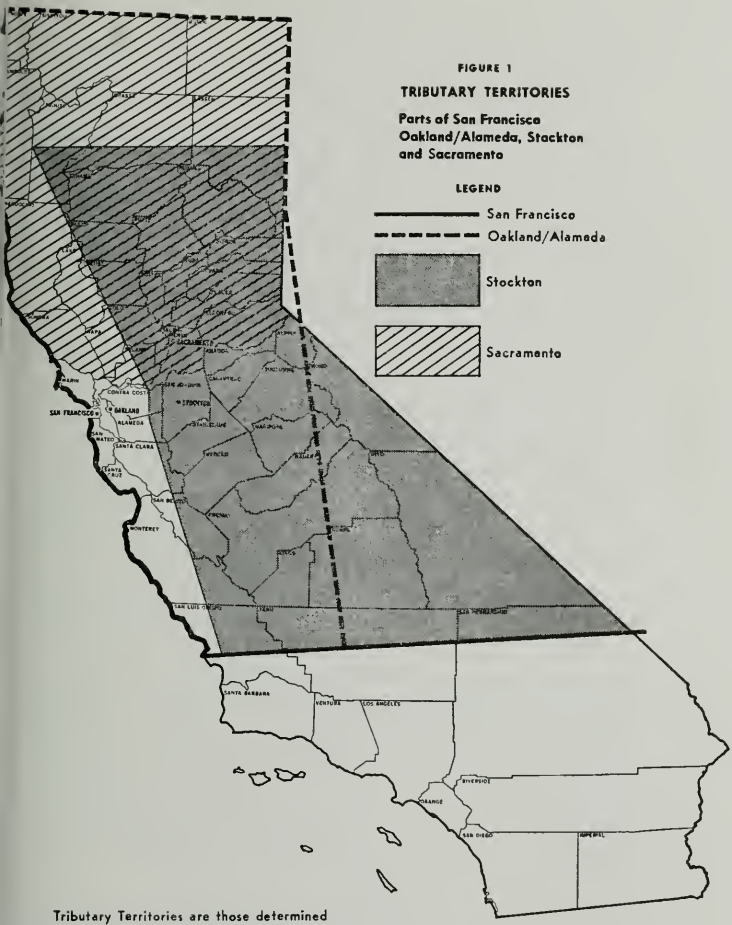
e. Determinations by the California State Legislature

Throughout the proceeding Stockton reserved its strongest language for a castigation of the notion that Stockton can in any sense be regarded a "Bay Area Port." The Commission (Com. Rep. 12, R. 1277) observed that in 1953 the California State Legislature, following the completion of a comprehensive fact-finding study by the State Senate,[9] adopted a program of research planning, harbor development and trade promotion for "the San Francisco Bay Area" (Calif. Harbors and Navigation Code, Sec. 1980, et. seq.) defined as:

> ". . . . that region served by commercial shipping and transportation passing through the Golden Gate, including tributary trade areas of Central and Northern California."

Stockton in its brief (p. 30) objects to this reference on the basis that such statute and its legislative history are not part of the record. It was wholly proper for the Commission to consider this determination by the California legislature in making its own decisions from *all* the evidence before it. The rules of the Com-

9. *Final Report of the Senate Fact-Finding Committee on San Francisco Bay Ports (Calif. Legisl. 1951)* p. 131, 373, in which the Committee had concluded that the recognition that all ports served through the Golden Gate "comprise *one* harbor is fundamental to progress."



Tributary Territories are those determined pursuant to § 8, Merchant Marine Act, 1920, as amended by the Maritime Admin.

Source: Exs. 47-50, inclusive.

mission provide that official notice may be taken of matters as might be judicially noticed by the courts, and also that public documents of the kind here involved may be received in evidence (46 CFR 502.226). That judicial notice may be taken of a state statute and its legislative history is well established. *Keystone Wood Co. v. Susquehanna Boom Co.*, 240 F. 296, 298 (3rd Cir. 1917) *cert. den.* 243 U.S. 655 (1917). (Statute); *Arizona v. California,* 283 U.S. 423, 453 (1930); and *Stasinkevich v. Nicolls,* 168 F.2d 474, 479 (1st Cir. 1948) (Legislative History). In any event Stockton made no attempt or effort to avail itself "upon timely request" of the opportunity provided by the aforementioned Commission rules to show the contrary. Thus assuming *arguendo* that the Commission decision rests upon the California statute, Stockton's remedy was to petition for opportunity to show facts to the contrary at the time it was raised on brief or at the time of the Commission Report in September, 1965. Whatever rights Stockton had in this regard have long since been waived. *Moon v. Celebrezze,* 340 F.2d 926, 929 (7th Cir. 1965); *American President Lines, Ltd.,* 4 FMB 555, 4 Ad.L.2d 820 (1955).

3. STOCKTON'S UNSOUND CONSTRUCTIVE MILEAGE THEORY OF PORT CONTROL

The essential ingredient in Stockton's attack on the findings of the Commission respecting the San Francisco Bay Harbor Complex Ports is a contention that Stockton is exclusively entitled to, and has a legally protected right to, all cargo as to which mileage favors Stockton as compared with mileage to any other port (Com. Rep. 14, R. 1279). This contention is based not on substantive facts but first upon pure theory, and secondly, upon a "syllogistic argument" resting on a faulty premise.

Stockton's theory is that mileage (which generally determines the costs of inland transportation) should be the sole determinant in establishing the geographical area tributary to any given ter-

minal port (Stock. Br. 31-37). Stockton uses the current "constructive mileage" table published by California State Public Utilities Commission for motor carrier regulation (Tr. 42-44, 146).[10]

The record disclosed several anomolies in this theory which the Commission Report appropriately recognized (pp. 14-15: R. 1279-80 and I.D. 19, R. 1250).

1. Tributary areas so defined continually expand and contract with each new innovation or improvement in highway conditions (Tr. 160-61).

2. Tributary areas are drastically curtailed or expanded, dependent upon the designation of terminal ports. Thus when the PWC, but not the Straits or Indonesian Conferences, named Sacramento a terminal port in 1963, the area purportedly tributary to Stockton for purposes of PWC carriers (but not for other conference carriers) was cut in half, because "that is the way the arithmetic comes out" (Exs. 8, 9; Tr. 64-66).

3. Stockton conceded that some areas westerly of California's eastern border, and in all states easterly thereof, are mutually tributary to all S. F. Bay Harbor Complex Port but presented no rational basis for its inconsistent exclusive claim to the San Joaquin Valley (Tr. 158, 160).

4. The theory produces serious inequities for Stockton's sister ports served through the Golden Gate. The four terminal ports closest to the sea—San Francisco, Oakland, Alameda and Richmond—end up sharing a slender territory along the coast, cunningly designed to prevent their access to the Northern California hinterland. San Francisco ends

10. "Constructive mileage" is road mileage weighted by such factors as traffic lights, bridges, mountainous terrain and other conditions affecting truck traffic (Exs. 4, 8, 9; Tr. 37, 43; Com. Rep. p. 14, R. 1279 fn. 6).

up with a "thin strip" of scenic territory (See Ex. 4). Figure 2 on the following page shows the tributary area claimed by Stockton and also shows the tributary areas allocable to other ports on Stockton's mileage theory.

The Examiner rejected the Stockton inland mileage theory stating (I.D. 19, R. 1250):

> "There may be situations where such a method of determining tributary territory would be realistic and appropriate; this is not such a situation."

The Commission agreed, stating (Com. Rep. 14, R. 1279):

> "But Stockton's theory is only deceptively simple and does not comport with the principles laid down in prior cases."

Those principles dictated that the geographical relationship of the ports, the "economies of transportation" and "the natural flow of commerce" are all relevant in determining whether the territory surrounding Stockton is "centrally, economically and naturally served" at other Bay Harbor Complex Ports (Com. Rep. 12, 16; R. 1277, 1281).

Beginning at page 31 of its Brief Stockton reiterates a bootstrap argument rejected by both the Examiner and the Commission, based upon a patent misreading of the equalization rule.

Rule 2 of the PWC defines equalization as follows (R. 1264-65):

> "Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at Terminal Dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line."

Rule 2(e) as it relates to equalization between California ports, formerly provided:

> ". . . . cargo *which would normally move* from one California terminal port, may be shipped under equalization via another California terminal port."[11]

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11. This language has been eliminated from Rule 2(e) pursuant to the Commission's Amended Order (R. 1304-05). Former Rule 2 is reproduced in its entirety in Appendix B.

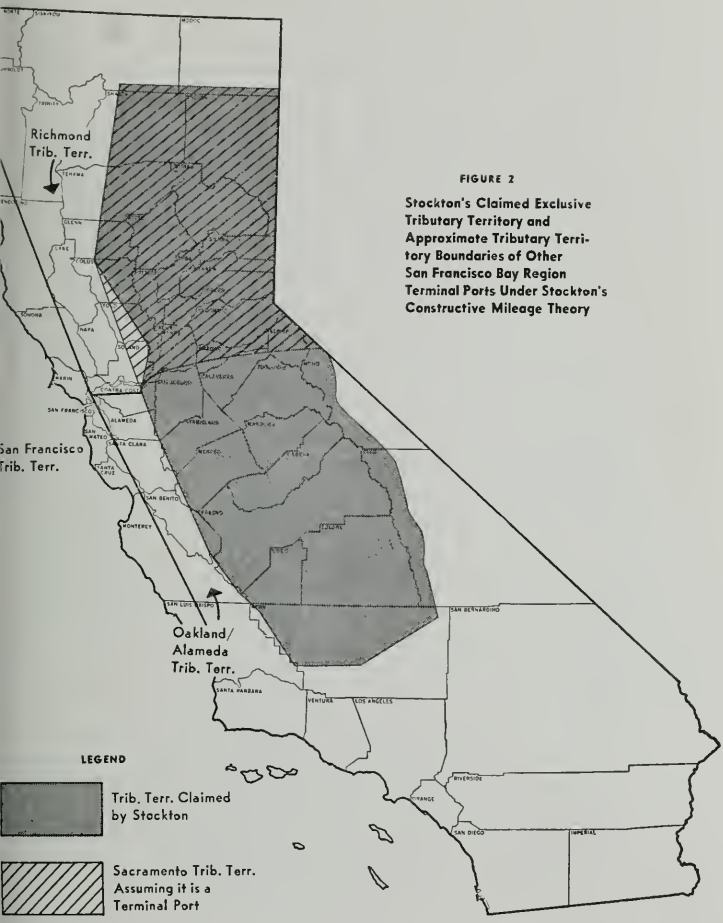

FIGURE 2

Stockton's Claimed Exclusive Tributary Territory and Approximate Tributary Territory Boundaries of Other San Francisco Bay Region Terminal Ports Under Stockton's Constructive Mileage Theory

Source: Stockton and Sacramento as in Ex. 4; Other Ports, Under the Same Assumptions.

Stockton's syllogistic argument (pp. 31-33) is to the effect that the underscored language of Rule 2(e) constitutes proof that cargo equalized on the basis Stockton is the nearest port is tributary only to Stockton.

The former language of the rule was not an acknowledgment or recognition by the Conference that equalized cargo was exclusively tributary to any port. The Conference can't "establish" tributary areas by such means in any event as *all* of the factors considered by the Commission are relevant. Normally in the context of the rule is simply a euphemism for "more cheaply or less cost" (Concur. Op. 9-10, R. 1314-15) since payment of equalization occurs when the shipper requests the same, and when he demonstrates on the basis of cost data furnished to the Conference that his inland transportation costs are cheaper to the terminal port closest to him than to the loading port selected by the carrier (See, Com. Rep. 2, R. 1267).

Possibly in an attempt to bolster the foregoing argument, Stockton objects strenuously to that part of the Commission's order which directed that the "which would normally move" language be removed from the rule (Com. Rep. 23, R. 1288) asserting that equalization can be paid only upon proof of shipper intent to use the nearest port. (Stock. Br. 45).

The Commission disposed of this contention in the following language:

> ". . . This apparent restriction has no practical relation to the theory or operation of the rule. Perhaps it was originally intended to make it clear that cargo may be equalized even though it might 'normally' move from another port, thus anticipating any objection on that ground. The rule should be drafted so as to exclude what is clearly not intended as a restriction. . . ." (Com. Rep. 23, R. 1288).

This interpretation is claimed by Stockton to be contrary to the record and erroneous as a matter of law. The testimony of a Conference witness clearly established, however, that whether the shipper had a subjective intent to use the nearest terminal

port if equalization were not paid is not a condition of payment. (See, Tr. 220-221). Neither the definition of the rule, any of the specific conditions of the rule, nor the rule taken as a whole, supports the interpretation that the "would normally move" language is a limitation to its application. Admittedly, the rule could stand clarification and the action of the Commission in ordering the "apparent restriction" to be eliminated was entirely consistent with its obligations under Section 18(b)(1) of the Act (46 U.S.C. § 817(b)(1)) under which carrier tariffs are required to "plainly" show and state, for the benefit of the shipping public, all rules and regulations affecting its rates and charges.

Having shown that the Commission's findings and conclusions respecting the geographical relationships and the tributary area of San Francisco Bay Harbor Complex Ports are fully supported by substantial evidence, we now turn to Stockton's claims that, irrespective of such findings and conclusions, equalization *per se* violates specific provisions of maritime promotional or regulatory statutes.

C. Equalization Is Not Contrary to Section 8, Merchant Marine Act, 1920

Stockton asserts (Stock. Br., Spec. of Error 6, 7; pp. 15-21) that equalization violates *per se* the policy of Section 8 in two respects, (1) that any practice which deprives Stockton of cargo which, under a constructive mileage basis might otherwise move via Stockton, is *a fortiori* a violation of that policy and is unlawful, and (2) that the policy of Section 8 requires all interests, save those of Stockton, to be ignored in determining whether equalization is "contrary to the public interest" in violation of Section 15.

Section 8 charges the Departments of Defense and Commerce (not the Commission) with three duties: (1) to promote, encourage and develop ports, (2) to investigate territorial regions and zones tributary to such ports and (3) to investigate

any matter that may tend to promote and encourage the use by vessels of ports. No power or jurisdiction with respect to Section 8 was vested in the Federal Maritime Commission when the Commission was created by Reorganization Plan No. 7 of 1961 (46 U.S.C. § 1111 (Note) and see, Concur. Op. 1, R. 1306; I.D. 13, R. 1244). Stockton concedes, at page 21 of its brief that Section 8 confers no power to act to promote ports, but asserts most inaccurately that the Commission "ignored" its policy in determining whether equalization is unlawful.

The Commission report is replete with references to the principles and policies of Section 8 (Com. Rep. 10-12, 15-16; R. 1275-77, 1280-81) as is the Initial Decision (I.D. 13-15, R. 1244-46), and even a cursory reading of the same would indicate that though the Commission was not required to do so, consideration was given to such principles and policies.[12]

Section 8 is "indicative of a congressional policy favoring port improvement and development". *Pacific Far East Line v. United States,* 246 F.2d 711, 716 (D.C. Cir. 1957). Section 8 directs the agencies charged with administering it

> "to investigate territorial regions and zones tributary to such ports, taking into consideration the economics of transportation by rail, water and highway and the natural direction of the flow of commerce . . . .".

This language, as the Commission quite properly recognized (Com. Rep. 12, R. 1277), does not require any mechanical mileage test as a measure of "territorial regions and zones tributary to such ports." If that was the intent Congress would have said so. What is relevant under the statute is the economics of transportation and the natural flow of commerce.

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12. Commissioner Patterson felt, and we believe, correctly, that the Commission should not decide the issues with reference to Section 8 in view of the fact that the Commission is not vested with any power or functions by Section 8. (Concur. Op. 4, R. 1309)

This view is consistent with an earlier restatement of the policy of Section 8 in which the Commission's predecessor[13] had said:

> "That section requires, all other factors *being substantially equal*, that a *given geographical area* and *its ports* shall receive the benefits of or be subject to the burdens naturally or incident to its proximity or lack of proximity to another *geographical area*. To the extent, therefore, that the ports of *a given geographical area* give or can give adequate transportation services, we look with disfavor on equalization rules which divert traffic away from the natural direction of the flow of traffic." (emphasis supplied) (*City of Portland v. Pacific Westbound Conference, supra* 4 F.M.B. at 679).

In the *City of Portland* case the Commission's predecessor had focused its concern, not upon individual ports, but upon "a given geographical area and its ports." The Commission here explained its rejection of the physical separation of Stockton from San Francisco Bay (or the mileage factor) as the sole determinant in invoking the protective policy of Section 8:

> "The delineation of a 'given geographical area' will almost always of necessity involve the inclusion of ports whose location from specified inland points will vary in distance or mileage. Thus, mileage alone is not the determinative factor." (Com. Rep. 12, R. 1277).

It is ironic that Stockton on the one hand, at page 21 of its opening brief, charges the Commission with ignoring the policy of Section 8, yet later at page 35, with equal vigor, castigates the Commission for relying upon a report implementing that statute prepared by the government agencies charged with administration of that Section. We have seen that the Departments of Commerce and Defense in the exercise of their functions under Section 8

13. This was before the Reorganization Plan of 1961, *supra* and at a time when the Agency then speaking (unlike the FMC) did have some responsibility under Section 8.

have determined that Stockton's tributary area is equally tributary to other S. F. Bay Harbor Complex Ports. In so doing they implicitly rejected the mechanical mileage test which Stockton claims Section 8 requires. For the Commission now to do likewise lends affirmative support to the conclusion that the Commission's focus upon geographical areas, rather than upon individual competing ports, is entirely consistent with any policy envisioned by Section 8.[14]

D. Equalization Is in the Public Interest

Stockton, at the outset, had claimed that equalization operated "to the detriment of the commerce of the United States," and was "contrary to the public interest," in violation of Section 15 of the Shipping Act, 1916.

The Commission, having weighed the various interests which, in the aggregate, comprise the public interest, found that not only was equalization not contrary to the public interest, but affirmatively concluded that equalization:

> "reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification" (Com. Rep. 20, R. 1285).

It appears to be Stockton's belief that the "public interest" is somehow identical with Stockton's self-interest, a myopic viewpoint which is said to be required by the policy of Section 8. (Stock. Br. 19-21). The various interests—the shippers, ocean carriers, and ports must each be considered:

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14. Nor does the fact that Stockton was developed with the assistance of public, including federal funds, establish any prior right under Section 8, as Stockton contends (Stock. Br. 18). This is answered convincingly by Commissioner Patterson who pointed out that the investment of federal funds "depends upon commercial potentialities, not on future rights. Once made, the investment does not thereafter create legal rights to a flow of business or entitle anyone to anything, but only creates opportunities to exploit." (Concur. Op. 16-17, R. 1321-22).

1. THE SHIPPER

The benefits to shippers resulting from equalization have been recapitulated at pages 23-25, *supra*. Perhaps the most accurate summary of the advantages to shippers appears in the Examiner's Initial Decision (p. 16, R. 1247):

> "Equalization is of substantial advantage to shippers. San Francisco provides many more direct sailings, on a regular basis, than does Stockton; it has a better climate, which is of importance in the case of certain perishable cargoes; and there is no delay in getting cargo aboard a vessel departing for the desired destination. San Francisco has a wider range of facilities to handle various types of cargo. . . . The faster service which shippers are thus able to give their foreign buyers through San Francisco, while keeping their costs down through equalization, is of benefit to the commerce of the United States and the public interest."

2. THE OCEAN CARRIER

The benefits which equalization affords to shippers are mutual benefits with those received by the ocean carrier. They have been described at pages 21-23, *supra*. They include:

> "[The] benefit (of) not having to make the extra 75-nautical-mile journey to Stockton for amounts of cargo insufficient to support regular berth service." [Concur. Op. 10, R. 1315].

The carrier by concentrating loading operations at the principal loading port of lesser cost thus avoids the need to call at other ports for unremunerative cargo which "gives the vessel latitude in loading and scheduling and the flexibility to avoid uneconomical calls" (Com. Rep. 7, R. 1272).

3. THE PORTS

Even if it can be assumed that cargo presently equalized on the basis Stockton is the nearest port which would otherwise move through Stockton—port revenues are not lost. The same charges

and the same revenues which Stockton allegedly "loses" through equalization flow to San Francisco or other loading port (Tr. 133).[15] If equalization is terminated, the Port of San Francisco is damaged (Tr. 1134-35). San Francisco, unlike Stockton is wholly financed out of revenues, and it is necessary for the port to meet its projected revenues to service its bonded indebtedness (Tr. 1143-45). Clearly Stockton made no better a case than San Francisco for protective treatment in this regard.

4. THE ALLEGED DISADVANTAGES TO STOCKTON

The short answer to Stockton's contentions that equalization deprives it of cargo or revenues resulting therefrom (p. 19) is that Stockton is not fundamentally entitled to the cargo which is equalized on the basis it is the nearest port to the shipper. (Com. Rep. 14, R. 1279; Concur. Op. 16, R. 1321), and it is no more entitled to the revenue produced by such cargo than it is to the cargo itself. Moreover, as the Commission found, Stockton's claimed "lost revenue" figures were "not valid" because Stockton would have had additional labor costs to produce such revenue and

> "as Stockton argues elsewhere, not all the equalized cargo would have gone to Stockton but for equalization, and the number of additional vessels which would have gone to Stockton is highly speculative" (Com. Rep. 14, R.1279; Tr. 131-33, 198-99; Ex. 16).

Stockton's phenomenal growth, despite the supposed detriment of equalization is fully documented on the record (Com. Rep., 22, R.1287). The Commission observed:

> "Moreover, it should be noted that even with equalization, Stockton's growth since 1957 has put it ahead of the ports of San Francisco, Oakland and Alameda combined, in export

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15. The Conference equalization rule permits equalization between any of the San Francisco Bay Harbor Complex ports. Accordingly each such port receives benefit and detriment from the rule in varying degrees.

tonnage. . . . Thus, equalization has not seriously affected Stockton's competitive position." (See also, Tr. 144, 1146-47; Exs. 44-46).

Stockton's concern (Stock. Br. 19) for carriers which serve Stockton is almost wholly a fabrication. The carriers serving Stockton are, of course, the same carrier respondents in the proceeding who, with one exception,[16] enthusiastically endorse and utilize equalization. (Com. Rep. 5-6, R.1270-71). Even to the extent carriers serving Stockton are "deprived" of cargo as the result of equalization, no contrariety to the public interest is shown because, as Commissioner Patterson notes (Concur. Op. 13, R. 1318):

> ". . . equally carriers serving San Francisco would be deprived of cargo under any other arrangement, and Stockton has not established any superior right to offset the conveniences of the shipping public and carriers."

5. THE INTERESTS IN THE AGGREGATE

We submit the Commission correctly considered each of these interests and it was entirely in accord with the public interest language of Section 15 for it to do so. Section 15 is a self-contained regulatory measure. *Alcoa Steamship Company v. Federal Maritime Commission,* 321 F.2d 756, 761 (D.C. Cir. 1963). Again, this is a matter for determination based on substantial evidence. It can

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16. Pacific Far East Line (PFEL) endorsed equalization in general, but criticized it as it applied to Stockton because of the peculiar relationship it has with that port. It called 45 times at Stockton in 1963, but only 17 of such vessels loaded any general cargo. The Commission observed that:

> "Respondent PFEL, the only carrier that was critical of equalization against Stockton frankly considers its position to be 'more advantageous than others insofar as calling at the Port of Stockton. . . . we have contracts for bulk cargoes for justification to put us up to the Port of Stockton which other lines do not have.' Thus PFEL feels it could get 'the lion's share' of any additional tonnage going through Stockton. Still PFEL now transships cargo from Stockton by truck and also equalizes against Stockton." (Com. Rep. 21, R. 1286, fn. 9; see, Tr. 496, 526-7).

not be argued, on the basis of the vague policy of Section 8 of the Merchant Marine Act, 1920, or otherwise, that Congress had intended the Commission to ignore all interests, excluding those of Stockton in administering the Shipping Act, 1916.

The Commission acted in accordance with sound administrative discretion when it concluded (p. 20, R. 1285):

> "But the public interest is much larger than the needs or desires in the Stockton area. The equalization under consideration here reflects an overall economic good, tangible benefit to the public at large, and an important transportation justification."

E. No Discrimination Between Ports in Violation of Sections 15 and 16 (First)

The Commission concluded that whatever prejudice or discrimination Stockton suffers it is not undue, unjust or unreasonable within the meaning of Sections 15 and 16 (First) of the Shipping Act (Com. Rep. 13-14, R. 1278-79).

The bare legal argument of Stockton begins from an extreme position. If cargo would move through Stockton if it were not for equalization, then says Stockton equalization is *ipso facto* unjustly discriminatory or unduly prejudicial to Stockton, because of the alleged "diversion" of cargo (Stock. Br., Spec. of Error 7, p. 25). This argument, however, overlooks the essential predicate upon which any assertion of diversion or deprivation of cargo must be based. That is, that Stockton must establish some prior and superior right to cargo which, but for equalization, would move via Stockton. Such right must be shown to be superior to that of Stockton's sister ports in the San Francisco Bay Harbor Complex and to the interests of shippers and carriers serving those ports. The Commission's factual findings precludes the existence of such a right.

One key to the Commission's decision rejecting Stockton's claims of unjust discrimination and undue prejudice in violation of Sec-

tions 15 and 16(First) is its findings and conclusions that cargo claimed to be exclusively tributary to Stockton is also tributary to San Francisco and other Bay Harbor Complex Ports. (Com. Rep. 13-14, R. 1278-79). Whatever discrimination or prejudice Stockton suffers from the purported diversion of cargo, is not "unjust" or "undue" because its right to the cargo is not exclusive or superior to the rights of the other ports.

The other key to the Commission ruling is its finding that there is "ample economic and cost justification for the discrimination such as it is" (Com. Rep. 14, R. 1279). At page 11 (R. 1316) of his concurring opinion, Commissioner Patterson finds this balancing of interests of paramount importance in determining whether any disadvantage suffered by Stockton is contrary to law:

> "Undue, unjust, or unreasonable discrimination, prejudice, and preference involve choices creating inequality of treatment of similarly situated persons for no reason. There are legitimate economic reasons for the carrier's rule based on the different situations at the two ports. (After referring to the advantages to carriers and shippers, Com. Patterson continued) . . . the rights of Stockton to be used as a port do not transcend these mutual advantages. . . ."

The Commission's determination under Sections 15 and 16(First) that Stockton is not subjected to undue, unreasonable or unjust discrimination must be sustained if supported by substantial evidence. The question of what is contrary to the standards of Sections 15 and 16(First) or unjustly discriminatory or unfair:

> ". . . . obviously turns upon a determination of facts—a function committed by Congress to the Commission, an expert body whose findings in this regard are not lightly to be disregarded by a reviewing court." *Alcoa Steamship Company v. Federal Maritime Com.*, 321 F.2d 756, 759 (D.C. Cir. 1963). See also *Swayne & Hoyt v. United States,* 300 U.S. 297 (1937).

F. The Commission's Decision Is Consistent with Prior Decisions

Stockton's argument (Stock. Br. 38-45) that the Commission's Report is inconsistent with prior decisions contains a fundamental misconception as to the role of a court reviewing an administrative order. It is not the role of this Court to determine whether each administrative decision is consistent with prior cases of the same agency, but rather whether the decision under review is in accord with the law and is supported by the record. *F.C.C. v. WOKO, Inc.*, 329 U.S. 223 (1946); *Wm. N. Feinstein & Co. v. United States*, 317 F.2d 509, 512 (2nd Cir. 1963) where the court said:

> "Second, plaintiff contends that the decision of the Commission should be set aside as arbitrary and capricious because of its alleged inconsistency with the Commission's earlier decision. . . . This contention is not sustainable; the mere fact of inconsistency with a prior decision, even assuming such inconsistency had been demonstrated, is not a valid basis for setting aside the later decision of an administrative agency. . . . In proceedings of this kind, a court reviews no more than the particular administrative order which the plaintiff has challenged and seeks to determine only whether the record in the case before it contains substantial evidence to support the findings upon which the order is based. . . . Because the record in a given prior proceeding is not before the court, any comparison of the kind which plaintiff seeks to have us make between an earlier and a later agency decision is neither possible or appropriate." 317 F.2d at 512.

The ability of the Commission to adapt to changed ideas, its experience, and new circumstances is one of the strengths of the administrative process. *Shawmut Assoc. v. S.E.C.*, 146 F.2d 791, 796 (1st Cir. 1945). Thus, the extent to which the Commission is fashioning new standards for testing equalization based upon a balancing of interests does not constitute any ground for judicial review.

Further, any contention that the Commission's decision is inconsistent with prior cases is ludicrous in view of the painstaking care which the Commission and the Examiner took to reconcile their respective decisions with the prior cases (See, Com. Rep. 11-16, R. 1276-81; I.D. 13-19, R. 1244-50).

Those prior cases had established that Equalization is not unlawful in principle. *Beaumont Port Commission v. Seatrain Lines, Inc.*, 2 USMC 500, 504 (1941); *City of Mobile v. Baltimore Insular Line*, 2 USMC 474, 486 (1941).

In every case in which the Commission or its predecessors have outlawed or modified an equalization or equivalent practice, they have done so on the basis that the practical consequence of equalization or absorption was to draw cargo away from the tributary area served by a group of ports to another group of ports serving a geographically distinct tributary area. (See, *City of Portland v. Pacific Westbound Conference, supra*).

In the *City of Portland* case, it was of crucial significance that equalization had the effect of drawing cargo from the area tributary to the Northwest Ports (Portland, Seattle, etc.) to the ports of California serving an entirely distinct tributary area. The Board stated:

> "To *the extent, therefore, that ports of a given geographical area give or can give adequate transportation services,* we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic." (4 FMB at 679.)

The Commission found a parallel to equalization within the Bay Harbor Complex in the case of *Port Commission of Beaumont v. Seatrain Lines*, 2 USMC 699 (1943). In that case, the so-called second *Beaumont* case, the U.S. Maritime Commission (a predecessor agency) permitted a carrier to equalize on cargo loaded at Texas City with respect to cargo originating in areas adjacent to

Houston and Galveston, Texas, but not cargo originating adjacent to Beaumont, Texas. The geographical relationship of Texas City, Houston and Galveston is comparable to that of San Francisco, Stockton and other Bay Area ports, respectively.[17]

Stockton, throughout the proceeding and now, attempted to distinguish the second *Beaumont* case on the basis of supposedly "unique" facts (Stock. Br. 42-43). It is contended that Houston does not occupy a position corresponding to Stockton, but both are located on inland waterways connecting with a bay on which other ports are situated. Stockton further claims a factual difference because, in the *Beaumont* case, the carrier economics favoring equalization centered around the cost of erecting special facilities at a port, rather than, as here, the costs incurred in moving from one port to another. This distinction is not material.

Additional precedent for the Commission's decision in the instant case may be found in the *City of Portland* case where the Commission made it clear that equalization is justifiable on grounds that service at the port area "losing" the cargo is not adequate for the needs of shippers there (4 FMB at 679 quoted at p. 43, *supra*). As we have seen, Stockton affords inadequate service for local shippers of general cargo to Far East ports.

The same precedents explain why the Commission ordered terminated equalization on cargo originating in areas tributary to the San Francisco Bay Harbor Complex Ports and loaded at Los Angeles/Long Beach. The Commission found that Los Angeles/Long Beach serve a different tributary area and no benefits to shippers or carriers as justification for equalization in that situation (Com. Rep. 26, R. 1291).

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17. The Commission quite obviously chose its language in the instant report with care in view of the geographical parallel with the second *Beaumont* case. In that case (as in this case) it noted—the "geographical relationship of the ports," the "peculiar characteristics" of the carrier's operation—the location of "Texas City and Galveston on Galveston Bay" which is also the approach to Houston, concluding ". . . the three ports may be described as Galveston Bay Ports." (2 USMC 699 at 701, 702).

G. There Is No Violation of Section 205 of the Merchant Marine Act, 1936

Stockton contends (Stock. Br. 22-23), without extensively arguing the point, that the equalization is *per se* a violation of Section 205 of the Merchant Marine Act, 1936.

Here, as in the case of Section 8 of the Merchant Marine Act, 1920, no function under Section 205 was transferred to the Commission under Reorganization Plan No. 7 of 1961. While not required to do so, the Commission has nonetheless given full consideration to the policy expressed in Section 205. (Com. Rep. 22-23, R. 1287-88).

The policy of Section 205 requires, at most, that carriers, or conferences of carriers, may not prevent other carriers from serving a federally assisted port by establishing different ocean rates than that established at an adjacent port.[18]

The Commission determined this policy was not violated, stating:

> "The rules, as applied, permit equalization in favor of Stockton to exactly the same extent as against it. Respondents comply literally with the statute by serving Stockton at the same rates which they charge at the nearest port regularly served by them, since the rates are the same for all bay area terminal ports. If equalization is considered to change the base rates from any such port respondents are in compliance with the statute because they offer the same equalization to shippers who wish to load at Stockton (Com. Rep. 23, R. 1288).

Stockton attempts to twist Section 205 into a policy disfavoring any competitive practice which prevents or discourages service

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18. Section 205 states:
"... it shall be unlawful for any common carrier by water either directly or indirectly ... to prevent or attempt to prevent any other such carrier from serving any port (serving ocean-going vessels and improved with federal funds) at the same rates which it charges at the nearest port already regularly served by it."

at Stockton. The assertion throughout Stockton's Brief (pp. 2, Spec. No. 10, 13, pp. 22-23) that the equalization rule "prevents" carriers from serving Stockton which would otherwise send their vessels to Stockton is not supported by the record.[19]

Except for the intermittent offerings of bulk or bottom cargo there is insufficient cargo at Stockton to justify calls there. The carrier witnesses testified unequivocally that direct service would not increase if equalization ceased due to operational problems and the fact that there would be insufficient cargo offerings. (Tr. 527, 881-2, 969-70, 1063-64, 1085).[20] The Commission accepted this uncontradicted testimony stating that the number of additional calls at Stockton in the event of termination of equalization is "highly speculative." (Com. Rep. 14, R. 1279).

As the Commission Report (p. 21, R. 1286) and the Concurring Opinion (p. 13, R. 1318) stated, equalization enables all conference carriers to be able to compete with each other with a minimum of economic waste, at every terminal port in the San Francisco Bay Harbor complex while still providing ocean service at the same rate at every terminal port.

Section 205 does not, nor was it designed to prevent competition between carriers, nor was it intended, as Stockton would have it, to force carriers to go to Stockton on an uneconomic basis. In any event equalization is in compliance with Section 205.

We repeat, however, this is an academic analysis so far as this case is concerned because it is the Commission's order that

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19. The quote on p. 22 of Stockton's Brief from the Commission's Report to the effect that Carriers find that competition "compels them to equalize" is part of the recital of charges made against equalization by those said to be opposed to the rule.

20. Even the one line, PFEL, that criticized equalization believed that initially there would be an increase in direct calls by its competitors, but that shortly thereafter it would be apparent that it would be economically attractive to PFEL only because of its bulk cargo commitments, and not to the others (Tr. 527). As pointed out previously the Carriers would avoid direct calls at Stockton by use of the economically wasteful use of transshipment.

is under review and the Commission has no responsibility or authority to issue an order under Sec. 205.

H. Equalization Does Not Violate Section 16(Second) of the Shipping Act, 1916.

Section 16(Second) makes it a criminal offense

> "to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means."

We find it mystifying, if not improper, for Stockton to charge a violation of Section 16(Second) when it made no such contention before the Examiner or the Commission. This provision, added to the Act in 1936, was designed to protect carriers from the coercion of large and overbearing shippers [H. Rept. No. 2598, 74 Cong., 2d Sess., p. 2]. The Commission and its predecessors and the courts have long interpreted as an "unjust or unfair device or means" under this provision, procedures designed to produce active concealment of reduced rates. The conduct made criminal by Section 16(Second) is a disequality of treatment accompanied by an act of concealment. *United States v. Peninsular and Occidental SS Co.*, 208 F.Supp. 957 (SDNY 1962).

The Commission has dealt with and properly disposed of all contentions of Stockton which could conceivably result in a finding that Section 16(Second) has been violated.[21]

Stockton now claims, however, where equalization is paid to a shipper who theoretically might have been willing to pay the

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21. Stockton claimed equalization violated Section 18(b)(1) of the Shipping Act, 1916, in that it creates inequalities and is unduly and unreasonably preferential as between shippers, and that it "serves as a cloak for malpractices," i.e. rebating. The Commission rejected each claim after correcting a tariff application not pertinent here. (Com. Rep. 17-21, 23-25; R. 1282-86, 1288-90). Stockton has not objected to the Commission's findings and conclusions in this regard.

higher costs of shipping the cargo to a more distant loading port if there were no equalization that an "unnecessary gratuitous rebate" has been paid, in violation of Section 16(Second).[22] When this case was before the Examiner and the Commission, this same theoretical circumstance was claimed by Stockton to be a "dissipation of carrier revenues" and detrimental to commerce and contrary to the public interest in violation of Section 15. The Commission rejected this claim (Com. Rep. 21-23, R. 1286-88) and Stockton does not challenge that conclusion.

Stockton's contention that equalization is administered in violation of Section 16(Second) depends upon a tortured construction of the Conference equalization rule. The former language of PWC tariff Rule 2(e) has been discussed heretofore, p. 32, *supra*. It provided, in effect, that cargo "which would normally move" from one California terminal port may be shipped under equalization via another such port. It is asserted (Stock. Br. 24-25), that this language requires proof of the subjective intent of the shipper—i.e., that in the absence of equalization he would use the nearest port. As we have seen, pages 32-33, *supra*, the rule was never intended to be nor has it been interpreted in that fashion, and the Commission agreed (Com. Rep. 23, R. 1288). There can thus be no claim that there is any departure from the tariff rules in violation of Section 16 (Second), and the amendment of the tariff rule to eliminate the "which would normally move" language in accordance with the Commission's Order removes any lingering doubt on that score.

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22. At page 24 of its Brief, Stockton attempts to make capital (of the language of the Commission's Report (p. 8)) that "If there were no equalization many perishable commodities would still move through San Francisco rather than Stockton." It is not clear whether the Commission is speaking of cargo which is presently equalized. If equalization were eliminated shippers presently equalizing would either have to absorb the costs of shipping via a distant port with adequate service, utilize the nearest port irrespective of whether service is adequate, or forego the export sale. (pp. 24-25, *supra*)

The Examiner pointed out, and the Commission and Commissioner Patterson agreed (Com. Rep. 21-22; Concur. Op. 13, R. 1286-87, 1318) that while some Stockton area shippers might possibly ship via San Francisco even if there were no equalization:

> ". . . there is no practicable way to determine how a shipper would act in any instance if equalization were not paid, and even if there were it would be clearly discriminatory to allow equalization only to shippers whose business could not otherwise be obtained. To find this argument of complainant's controlling, it would be necessary to attribute surprisingly bad judgment to respondents and complainant, the former for offering equalization at all and the latter for bothering to prosecute this proceeding." (I.D. 25-26, R. 1257)

I. No Violation of the Fifth Amendment

Stockton claims offhandedly that its arguments, heretofore answered in this brief, establish a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution (Stock. Br. 48).

We have shown that the cargo which Stockton claims to have been "diverted" from it is not the "property" of Stockton and that it has no legally protected right to have it move over its facilities. We have also shown that the Commission Report and Order is warranted by law and supported by substantial evidence.

In these circumstances there can be no violation of the Fifth Amendment.

IV.

CONCLUSION

The administrative agency hearings in this matter were extensive and thorough. Following the hearing, the Presiding Examiner wrote a thoughtful and orderly Initial Decision of some 32 pages in length, which made complete findings of the background facts, and after full analysis of the law reached his conclusion, rejecting

Stockton's claims. One year later, after the matter had again been fully briefed and argued, the Commission issued its Report and Order of 27½ pages, adopting the Examiner's Initial Decision, again fully supported by findings and conclusions as required by the APA. A comprehensive Concurring Opinion of some 26 pages supplements the Commission Report, reinforcing the reasons why Stockton's claim must be rejected.

In its efforts to terminate equalization and to promote its self-interest contrary to the interests of other ports, shippers and carriers and the public interest generally, Stockton raised before the Examiner and Commission every conceivable objection to the Conference equalization rules. The Examiner and Commission having rejected these claims, Stockton resumes and extends the same claims in this action for judicial review.

Stockton here charges certain findings and conclusions by the Commission are unwarranted by law and unsupported by substantial evidence. It has the burden of making a clear and convincing showing of such alleged errors. With the agreement of both levels of the Administrative agency, both possessing expertise and special qualifications in the maritime regulatory field, Stockton's burden is an extremely heavy one. We submit it has completely failed in discharging that heavy burden.

Stockton has not really attempted to show the findings and conclusions of the Commission which it challenges are unwarranted by law and unsupported by substantial evidence. Instead it has merely renewed contentions made before the Agency, inviting this court to substitute its judgment on matters which are confided by statute to the Agency expert in its field and which were determined by the Agency entirely consistent with the statutes it is directed to administer.

In the foregoing discussion in this Brief we have, on the other hand, attempted to show affirmatively that the Commission Report is clearly warranted by law and abundantly supported by substan-

tial evidence and within its authorized discretion and statutory responsibility. This Court, on judicial review, is not required, nor indeed permitted, to substitute its judgment for that of the Agency as to findings drawn from such evidence.

Respectfully submitted,

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Dated: August 11, 1966.

Certificate of Counsel and of Service

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

I further certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing, by air mail, postage prepaid, one copy to Walter H. Mayo III and Irwin A. Seibel, attorneys for the respondents, and by mailing three copies thereof, by regular first-class mail, postage prepaid, to Albert T. Cronin, Jr. and J. Richard Townsend, attorneys for the petitioner, and one copy thereof to Leonard G. James, attorney for intervenors Pacific Straits Conference and Pacific/Indonesian Conference and member lines, and Miss Miriam E. Wolff, attorney for intervenor San Francisco Port Authority.

Dated at San Francisco, California, August 11, 1966.

GORDON L. POOLE
Attorney for Intervenors
Pacific Westbound Conference
and Its Member Lines

(Appendices Follow)

Appendix A

STATUTES AND REGULATION RELIED UPON

1.

Section 15 of Shipping Act, 1916 (46 U.S. Code 814)

"That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. * * *"

2.

Section 16 (First) and (Second) of Shipping Act, 1916 (46 U.S. Code 815)

"* * * * * * *

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

* * * * * * *"

3.

Section 18(b)(1) of Shipping Act, 1916 (46 U.S. Code 817(b)(1))

"From and after ninety days following October 3, 1961 every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the

aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement. Copies of such tariffs shall be made available to any person and a reasonable charge may be made therefor. The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count, or to cargo which is softwood lumber. As used in this paragraph, the term "softwood lumber" means softwood lumber not further manufactured than passing lengthwise through a standard planing machine and crosscut to length, logs, poles, piling, and ties, including such articles preservatively treated, or bored, or framed, but not including plywood or finished articles knocked down or set up."

4.

Section 8 of Merchant Marine Act, 1920 (46 U.S. Code 867)

"That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection

with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law."

5.

Section 205 of Merchant Marine Act, 1936 (46 U.S. Code 1115)

"Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it."

6.

Section 10(e) of Administrative Procedure Act (5 U.S. Code 1009(e))

"Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions,

and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

7.

Fifth Amendment to Constitution of the United States

"No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

8.

46 CFR 502.226 (Rule 13(f) of the Rules of Practice and Procedure, Federal Maritime Commission)

"(a) Official notice may be taken of such matters as might be judicially noticed by the courts, or of technical or scientific facts within the general knowledge of the Commission as an expert body: *Provided,* That where a decision or part thereof rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so

stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

(b) Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a state or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or relevant part thereof."

Appendix B

RULE NO. 2 OF PACIFIC WESTBOUND CONFERENCE

(As set forth in Appendix A of Report of Federal Maritime Commission in Docket No. 1086)

(The "Equalization rule", so far as it relates particularly to the Port of Stockton, is underlined.)

Subject to Rules 5, 7 & 9, rates are based on direct loading at Conference terminal loading ports or docks. However, individual member lines may, in lieu of a direct call, absorb the cost of transhipment between terminal ports; or between terminal ports and non-terminal ports; also between non-terminal ports. Reference to non-terminal port absorption applies only if the non-terminal ports have the required minimum tonnage as specified in Rule No. 9, or elsewhere in this tariff. Carriers may equalize between terminal ports only from point of origin, as provided and subject to the limitations set forth herein.[1] Equalization is the absorption by the carrier of the difference between shipper's cost of delivery to ship's tackle at Terminal Dock at nearest conference terminal port and the cost of delivery to ship's tackle at terminal dock and port of equalizing line. Conference terminal ports and docks are those named in Rule No. 5. Conditions and limitations as to equalization follow:

(a) Equalization shall not exceed an absorption in excess of 35 percent of the ocean freight, including handling charges and wharfage.

1. In the Pacific Straits Conference rule and the Pacific/Indonesian Conference rule, the following appears in lieu of the foregoing four sentences:

> Rates are based on direct loading at loading port or docks, but the individual member line Carriers may meet the competition of other member lines loading direct at terminal ports or docks, either by transhipment or by equalization from point of origin.

Otherwise the rules of the three conferences are substantially the same, insofar as they relate to the Port of Stockton.

(b) A carrier may not equalize between terminal ports and non-terminal ports, or between non-terminal ports or between docks within a port.

(c) When the inland cost of transportation from point of origin is lower to terminal ports in Oregon, Washington, or British Columbia than via California terminal ports, equalization may be applied via California terminal ports only on shipments of deciduous fruits and dairy products (See Note below covering Explosives) and such equalization shall be permitted only so long as there is not adequate service from the terminal port in Oregon, Washington, or British Columbia, to which the cargo is tributary, to meet the needs of shippers of these commodities.

NOTE: Equalization on explosives is not permitted except that in the event a shipper is unable to obtain space for a specific shipment of explosives by a direct sailing from a terminal through which explosives would normally move at a date which reasonably will meet the needs of such shipper or his consignee, equalization shall be permitted on such shipment, Provided, that the shipper certifies to the Conference the need for space on such date and allows 48 hours after receipt of such certification for the Conference to indicate the conference carriers who can provide space on a direct sailing which reasonably will meet the shipper's needs.

(d) Equalization is permitted on shipments of fresh fruits, which would normally be shipped via California terminal ports when shipped via terminal ports in Oregon, Washington, or British Columbia, when there is not adequate service from the California port, to which the cargo is tributary, to meet the needs of shippers of these commodities.

(e) Cargo which would normally move from one terminal port in Oregon, Washington, or British Columbia, may be

shipped under equalization through another terminal port in Oregon, Washington, or British Columbia, and cargo which would normally move from one California terminal port, may be shipped under equalization via another California terminal port.

(f) Equalization shall only be paid on the basis of the lowest applicable common carrier or contract carrier rates.

(g) In support of each claim for equalization the shipper must furnish the carrier a copy of transportation bill covering movement from point of origin.

(h) Prior to payment of equalization bills, Carriers must submit to the Conference on prescribed form a certified statement for confirmation and approval of applicable interior rates and/or the basis for equalization.